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Supreme Court of The United States

OCTOBER TERM, 1962

No. 63

BARBARA D. FORD,

Petitioner

v.

HERMAN A. FORD,

Respondent

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

OPINION OF THE COURT BELOW

The opinion of the South Carolina Supreme Court printed in appendix A, hereto, is reported in 239 S.C. 305, 123 S.E. 2d 33.

GROUNDS OF JURISDICTION

In his answer to the petitioner's action for custody filed in the Juvenile and Domestic Relations Court for Greenville County, South Carolina, the respondent claimed a right under U. S. Const. Art. IV, § 1, alleging that a prior order of the Law and Equity Court of the City of Richmond, Virginia was entitled to full faith and credit whereby the matter was res judicata. The claimed right was denied by the Juvenile and Domestic Relations Court and by the Court of Common Pleas for Greenville County to which he appealed, but the South

Carolina Supreme Court to which he thereafter appealed sustained the right.

On January 15, 1962 a petition for writ of certiorari to the Supreme Court of South Carolina was filed under 28 USC. Sec. 1257 (3), and certiorari was granted by order of this Court, filed February 26, 1962.

CONSTITUTIONAL PROVISION INVOLVED

Article IV.-States-Reciprocal Relationship Between States and With United States

Section I. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

STATUTE INVOLVED

Title 28 § 1738. *State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit.*

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The Records and judicial proceedings of any court of any State, Territory, or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.

QUESTION INVOLVED

Does an order of dismissal of a habeas corpus proceeding in the Law and Equity Court of the City of Richmond, Virginia, which was voluntarily obtained after the parties privately agreed concerning the custody of their infant children, preclude the courts of the State of South Carolina from awarding custody based upon the best interest of the children?

STATEMENT

The petitioner, Barbara Ford, and the respondent, Herman Ford, are the mother and father of three children, now five, seven, and nine years of age. Custody of the children was the subject of a habeas corpus proceeding instituted by Herman Ford in the Law and Equity Court of the City of Richmond, Virginia in August, 1959, which was dismissed on November 18, 1959, and was the subject of an action filed by Barbara Ford in the Juvenile and Domestic Relations Court of Greenville County, South Carolina in August, 1960. Herman Ford appealed from the decree of the latter court to the Court of Common Pleas for Greenville County, wherein the decree of the trial court was affirmed with minor modifications, and thence to the South Carolina Supreme Court, wherein the decrees of the lower courts were set aside on the ground that the Virginia dismissal was res judicata and entitled to full faith and credit. The matter is thus before this Court on writ of certiorari.

A brief reference to the factual background is necessary to an understanding of the circumstances by which the habeas corpus proceeding was instituted in Virginia when the parties were residents of North Carolina. Barbara and Herman Ford married in 1952, and after living in numerous places in Southeastern United States and in Germany, they moved, in January 1958, to Sanford, North Carolina and established a permanent residence (R. 138). In August, 1959 marital difficulty developed between them and they decided to make an overnight trip to Richmond, Virginia to discuss the problem with a psychiatrist (R. 72, 150), leaving the children in Sanford, with

their maid. When they arrived in Richmond, however, Herman Ford stated, according to Barbara, that he intended to obtain a divorce and take the children (R. 72), or, by his testimony, that he would try to get custody of the children (R. 150). He left Barbara Ford in Richmond at her mother's home, and the next day she returned to Sanford and found that the maid and the children were gone and their house was closed (R. 73). After calling hotels and motels in the vicinity and in Greensboro and Raleigh, North Carolina she finally discovered that Herman Ford had called the maid from Richmond and arranged to have her driven with the children to a motel in Fayetteville, North Carolina (R. 73, 74, 155, 156). Barbara Ford took the children from the motel and returned with them to her mother's home in Richmond, whereupon Herman Ford filed the habeas corpus proceeding in the Law and Equity Court of the City of Richmond seeking their custody.

Barbara Ford, by her attorney, filed her return and a motion to quash the writ (R. 19, 20), but thereafter, by means of correspondence between their attorneys which was not revealed to the court (R. 25), an arrangement for the care of the children and dismissal of the habeas corpus proceeding was agreed upon (R. 12, 15); and on November 18, 1959 an order of dismissal was filed, which recited in its entirety (R. 20):

> "It being represented to the court by counsel that the parties hereto have agreed concerning the custody of the infant children, it is ordered that this case be dismissed."

On January 10, 1960 Barbara Ford moved to Greenville, South Carolina. About ten days later the youngest child, Jay, was brought to live with her (R. 76, 143), and on June 20, 1960 the other two children were brought to live with her during the summer (R. 144). When she had become situated to care for the children, having attended business school and obtained employment (R. 75), and instituted the action in the Juvenile and Domestic Relations Court for Greenville County, all three children were thus living with her. The action was instituted

on August 10, 1960 and personal service was had upon Herman Ford when he came to Greenville on that date (R. 145).

Herman Ford's answer was in the form of a general denial and it also plead in bar to the action as res judicata the correspondence effecting the private agreement and the order of dismissal of the habeas corpus proceeding in the Law and Equity Court of the City of Richmond (R. 8-11).

After lengthy hearings at which eleven witnesses testified, the Judge of the Juvenile and Domestic Relations Court, who has exclusive jurisdiction over such matters,[1] held that the agreement was not a part of the decree of the Law and Equity Court of the City of Richmond and that the order of that court was not res judicata but was a mere order of dismissal without prejudice (R. 25). As to the merits, he found that it would be to the best interest of the children to be in the custody and control of their mother and decreed accordingly (R. 28), but suggested "that the parties work out a provision for the defendant to have the children during a portion of their summer vacation and on holiday seasons, as well as certain other visitations." (R. 27).

On appeal to the Court of Common Pleas the record consisted of the transcribed typewritten record of the evidence in the Juvenile and Domestic Relations Court, the appellant's narrative statement of the proceedings, and his exceptions and assignments of error thereto (R. 187), including, among others, the failure to hold that the order of dismissal of the Law and Equity Court of the City of Richmond was binding and res judicata (R. 37). In his order, by which the decree of the trial judge was modified only to the extent that the respondent would have custody of the children during specified holiday periods rather than visitation rights during such periods to be agreed upon by the parties, the Judge of the Court of

1. S. C. 48 Stat. 1827 (1954), Sec. 7. When court to have original jurisdiction. — (a) Except as otherwise provided herein the court shall have exclusive original jurisdiction and shall be the sole agency for initiating action concerning any child living or found within the county: *** (5) whose custody is the subject of controversy except in those cases where the law now gives other courts exclusive jurisdiction; ***

Common Pleas said with regard to the Virginia proceeding (R. 188, 189):

> "Much has been said in this case about the agreement that was reached between the plaintiff and the defendant, as a result of the settlement of the Habeas Corpus custody proceeding before the Law and Equity Court of the City of Richmond, Virginia, being res adjudicata and controlling in this proceeding. To hold that the custody of these three children was fully and finally determined in Richmond, Virginia, by the agreement reached between the plaintiff's attorneys and the defendant's attorneys would be unfair to the children and too harsh a rule to follow. The children were not parties to the suit in Richmond, Virginia. The children were before that Court only in the capacity of bodies that were being contended over. The children were merely the res that was being pulled back and forth between the mother and father. These children are the especial charges of this Court of Equity and their interest is paramount and even if it is necessary to disregard established principles of law in order to protect their interest that will be done by a Court of Equity when it appears that the best interest of the children is jeopardized."

Herman Ford then appealed to the South Carolina Supreme Court on similar assignment of error (R. 191). By the majority opinion of the South Carolina Supreme Court filed November 15, 1961, it was held that the order of the Law and Equity Court of the City of Richmond, Virginia was an order "dismissed agreed", constituting a judgment on the merits barring another action for the same cause in Virginia; and that under Article IV, Section 1 of the Constitution of the United States the South Carolina Court was required to give full faith and credit (R. 205). Mr. Justice Oxner dissented, however, stating that in this proceeding the respondent, Barbara Ford, is not seeking to relitigate an issue which had been litigated in Virginia (R. 207), and that the order entered by the Virginia Court was not pronounced in the exercise of its judicial function (R. 208).

Within due time a petition for rehearing was filed in the

South Carolina Supreme Court, which was refused, Mr. Justice Oxner again dissenting. Thereafter on January 15, 1962 the petitioner, having obtained a stay of remittitur from this Court, filed a petition for writ of certiorari to the Supreme Court of South Carolina, which was granted on February 26, 1962.

SUMMARY OF ARGUMENT

The petitioner readily concedes that the South Carolina Court may, if it sees fit, recognize as a matter of local law the order of dismissal of the Law and Equity Court of the City of Richmond. Similarly, it could, although not consistent with its responsibility, award custody in accordance with the parent's private agreement which had been determined not to the best interest of the children. The petitioner urges, however, that the South Carolina Court erred in concluding and holding that the order of dismissal of the Virginia Court was res judicata and, in any event, that the South Carolina Courts were inexorably bound under Article IV; Section I of the Constitution of the United States to give full faith and credit thereto for the reasons that:

(a) There was no judicial determination on the merits by the Virginia Court. In actions involving custody of infants a court may inquire into "what was litigated and what was adjudicated"[2] in a previous action; and "when an earlier award was made casually, upon a consent basis, or without full inquiry ••• the decision is entitled to little weight in another court, which, later faces squarely the question of the child's present welfare."[3]

(b) As is implicit by the language of the *Act of May 26, 1790, c. 11*, as amended, 28 U. S. C. § 1738 (1948), and as was held in *People of State of New York v. Halvey*, 330 U. S. 610 (1947) a judgment or order has no more conclusive or final ef-

2. People of State of New York v. Halvey, 330 U. S. 610, 616 (1947).
3. Boone v. Boone, 150 F. 2d 153, 156 (D. C. Cir. 1945).

fect in the State of the Forum than it has in the State where rendered. The order of the Virginia Court was not, by law or usage in the courts of that State, res judicata, thus it is not res judicata in the South Carolina Court. And,

(c) The South Carolina Court, when its jurisdiction is invoked in its capacity as *parens patriae*, is unrestricted in its power and duty to determine what is in the best interest of the children before it and to award custody accordingly, *May v. Anderson*, 345 U. S. 528 (1953) (concurring opinion by implication); *Boone v. Boone*, 150 F 2d 153 (D. C. Cir. 1945).

I

The Order Of The Virginia Court Was Not The Product Of An Adjudication On The Merits Therefore It is Not Entitled To Full Faith And Credit.

Recapitulating the uncontroverted facts and circumstances of this litigation as set forth in the record: The habeas corpus proceeding was instituted in the Virginia Court at a time when neither of the parties nor their children were residents or domiciliaries of Virginia (R. 16). The children were not physically brought before the court (R. 19), and the parents, by their attorneys, merely filed pleadings therein. There was no hearing on the merits (R. 20); and the agreement of the parents, which was reached privately and which was not even formalized into a writing carrying their signature (R. 12-15), was not revealed to the court (R. 25).

The order of the Law and Equity Court contained no findings of fact, no conclusions of law, no incorporation by reference of any written instrument or letter, and did not recite that it was a dismissal with prejudice (R. 20, 25).

On the other hand, the proceeding in South Carolina was instituted when the petitioner and all three children were, and had been for several months, domiciled in Greenville County, South Carolina (R. 76, 143, 144), and personal service was had upon the respondent therein (R. 145). Formal hearings at

which eleven witnesses testified and full arguments, both as to the best interests of the children and the effect of the Virginia proceeding, were heard before the Judge of the Juvenile and Domestic Relations Court who specializes in such matters. Based upon the evidence and having had the opportunity to see the witnesses on the stand and hear their testimony, the Juvenile and Domestic Relations Judge concluded, in effect, that the private agreement of the parties did not provide for the children's best welfare (R. 26, 27); and in his very comprehensive order custody was awarded solely upon the basis of that which was in the children's best interest.

In accordance with the South Carolina procedure, the matter was appealed to the Court of Common Pleas for Greenville County, and the Judge of that Court, having the entire transcript of the testimony before him (R. 187), and having heard oral arguments and considered the written briefs of counsel, affirmed the trial judge in all material respects.

As against this background, we are here squarely faced with the question of whether the Constitution of the United States requires that the former proceeding take priority over, or preclude, the latter, whereby the children's welfare should be subverted to the private agreement of their parents, regardless of whether same is deemed formal or informal, and regardless of the intent of the parties as to its permanency and of the circumstances under which it was made.

As indicated by the concurring opinion of Mr. Justice Frankfurter in *People of the State of New York v. Halvey*, *supra*, inquiry by the South Carolina Court as to what was litigated and what was adjudicated in the Virginia Court was not foreclosed; and surely, as shown by the foregoing recapitulation, the Virginia proceeding could not be deemed a true adjudication on the merits. The weight and effect to be given such an order was in issue in *Boone v. Boone*, *supra*, wherein the court, in referring to the test of changed circumstances, quoted Judge Edgerton in the earlier Boone case[4] as follows: "This is simply to say that we should not needlessly thresh

4. Boone v. Boone, 132 F. 2d 14, 16 (D.C. Cir. 1942).

over old straw but should apply the doctrine of res judicata as far as the nature of the case permits." The court agreed that when the court of one state has exercised control over a child and the child comes under the control of another jurisdiction, the courts of the latter should respect the earlier judgment, to the extent that issues there presented were then judicially determined; but it went on to succinctly state, at page 156 of the Report:

> "When an earlier award has been made, casually, upon a consent basis, or without full inquiry—or when the decision, and the record back of it, reveals that it is based upon considerations of illegality of detention, res judicata and other such formulae—that decision is entitled to little weight in another court which, later, faces squarely the question of the child's present welfare."

The persuasive logic employed in *Boone v. Boone, supra,* was also employed in Ex parte *White,* 49 Cal. App. 2d 160, 161, 121 P. 2d 100, 101 (1942), *aff'd* 54 Cal. App. 2d 637, 129 P. 2d 706 (1942), wherein the court said:

> "• • • Furthermore, the petition recites that at the former hearing no evidence was introduced relating to the fitness of any of the parties to have the custody of the minor, or of environment. The court made no findings, but merely denied the writ. The question decided by the Superior Court was therefore one of law alone. Petitioner is therefore entitled to a full hearing in this court upon the issues, set forth in her petition."

In South Carolina, as in most if not all states, when an action is by or against an infant he must appear by guardian ad litem,[5] and before such guardian ad litem may settle the action he must present to the court with a copy of the pleadings a verified petition stating the reasons why, in his opinion, the settlement should be made. The court must then consider the matter and can authorize the guardian ad litem to consummate the settlement only when, in its discretion, the settlement is

5. S. C. Code § 10-231 (1952).

proper and to the best interest of the minor.[6] It would, indeed, be a curious anomaly if our court did not guarantee equal or greater protection to a minor when his very life and well being are involved, than it grants when a minor's mere property rights are involved; and we earnestly contend that the Framers of the Constitution of the United States could not have intended that Article IV, Section I be interpreted to enforce such a result.

II

Regardless Of Whether The Order Of The Virginia Court Was An Order Of Dismissal Or An Order "Dismissed Agreed It Is Not Res Judicata To An Action For Custody Based Upon The Best Interests Of The Children.

The order of the Law and Equity Court of Richmond provided:

> "It being represented to the court by counsel that the parties hereto have agreed concerning the custody of the infant children, it is ordered that this case be dismissed."

By the *Act of May* 26, 1790, c.11, as amended, 28 U. S. C. § 1738 (1948), records and judicial proceedings shall have the same full faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken. The question, therefore, arises: If custody decrees in general, and the order of the Law and Equity Court of Richmond involved herein in particular, are of such nature as to be entitled to full faith and credit, what was the effect of the order of the Law and Equity Court by law or usage in the courts of Virginia, or, specifically, would it be res judicata in that state?

The Supreme Court of South Carolina decided that the order was an order "dismissed agreed" under Virginia decisions, and as such could have been successfully interposed under a

6. S. C. Code § 10-1005 (1952).

plea of res judicata in Virginia. This decision is, we submit, erroneous and cannot be accepted by this Court as final.[7]

The effect of an order "dismissed agreed" was first considered by the Supreme Court of Appeals of Virginia in *Hoover v. Mitchell*, 66 Va. (Gratt.) 387 (1874).[8] In that case a suit was brought to recover an amount paid by the plaintiff as endorser of a note, which suit was dismissed by the following order:

> "This day came again the parties by their attorneys, and this suit having been agreed, on motion it is ordered that this suit be dismissed agreed."

Subsequently, the plaintiff brought a second suit on the same cause of action against the same defendants, to which the defendants tendered a plea of former judgment. Being of the opinion that the order was tantamount to a retraxit, that is, an open and voluntary renunciation of the suit in court, the Supreme Court of Appeals of Virginia reversed the trial court's action in rejecting the plea and entered its judgment that

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7. "While this Court re-examines such an issue with deference after its determination by a state court, it cannot, if the laws and Constitution of the United States are to be observed, accept as final the decision of the state tribunal as to matters alleged to give rise to the asserted federal right. This is specially the case where the decision is rested, not on local law or matters of fact of the usual type, which are peculiarly within the cognizance of the local courts, but upon the law of another state, as readily determined here as in a state court." Adam v. Saenger, 303 U. S. 59, 64 (1938).

8. While a number of decisions of the Supreme Court of Appeals of Virginia have discussed "dismissed agreed" orders, in only four discovered cases has such an order been held to be a bar to a succeeding action. Martin v. Martin, 167 Va. 206, 188 S.E. 148 (1936); Hinton v. Norfolk and Western Ry. Co., 137 Va. 605, 120 S.E. 135 (1923); Wohlford v. Compton, 79 Va. 333 (1884); Hoover v. Mitchell, 66 Va. (25 Gratt.) 387 (1874). Other cases involving or mentioning such orders are: Virginia Concrete Co. v Board of Supervisors, 197 Va. 821, 91 S.E. 2d 415 (1956); Murden v. Wilbert, 189 Va. 358, 53 S.E. 2d 42 (1949); Aetna Casualty Co. v. Board of Supervisors, 160 Va. 11, 168 S.E. 617 (1933); Bardach Iron and Steel Co. v. Tenenbaum, 136 Va. 163, 118 S.E. 502 (1923); Payne v. Buena Vista Extract Co., 124 Va. 296, 98 S.E. 34 (1919); Tate v. The Bank of the State of New York, 96 Va. 765, 32 S.E. 476 (1899); Wilcher v. Robertson, 78 Va. 602 (1884); Siron v. Ruleman's Ex'or, 73 Va. (32 Gratt.) 215 (1879).

"the dismission of a suit agreed, without any explanation or qualification showing a contrary intention, is at least a prima facie determination of the matters controverted in that suit, and may be pleaded in bar of a subsequent suit in the same cause of action between the same parties; . . ."[9]

Subsequent opinions of the Virginia court, however, leave no doubt that an order "dismissed agreed" must be distinguished from an order of dismissal.[10] The latter, in Virginia, is not a bar to a second action, even though entered by consent of the parties.[11]

The precise issue of whether or not an order in the language of, and entered under the circumstances of, the order involved in this case constitutes an order "dismissed agreed" has not been decided by the Virginia court; nor has the precise issue of whether or not, in any event, such an order would be given effect as res judicata in a custody proceeding been decided by that court.

Subsequent to its initial decision in *Hoover v. Mitchell, supra,* the Virginia court held that an order "dismissed agreed" barred second actions to secure contribution on the purchase price of real property from an alleged joint purchaser,[12] to recover damages for personal injury in a negligence action,[13] and to determine the validity of a deed of trust on a piece of real estate.[14] In none of these cases was any consideration of public policy, such as is inherent in the question of custody of infants, even remotely involved. Nor were the orders involved in these cases the same as the one before the Court in this case.

Initially, it is not clear that the order of the Law and Equity Court of the City of Richmond is in fact a "dismissed

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9. Hoover v. Mitchell, *supra* at 391.
10. See Payne v. Buena Vista Extract Co., 124 Va. 296, 313, 98 S.E. 34, 40 (1919).
11. Wilcher v. Robertson, 78 Va. 602, 618 (1884).
12. Wohlford v. Compton, 79 Va. 333 (1884).
13. Hinton v. Norfolk and Western Ry. Co., 137 Va. 605, 120 S.E. 135 (1923).
14. Martin v. Martin, 167 Va. 206, 188 S.E. 148 (1936).

agreed" order, rather than simply an order of dismissal. Two features of the order should be noted: first, by its terms it merely orders that the "case be dismissed", omitting the word "agreed"; second, it appears from the order that the terms of the agreement were never revealed to the court.

Analysis of the Virginia decision reveals that in those cases in which the order did not expressly state that the case was "dismissed agreed," the terms of the agreement were revealed to the court before its order was given res judicata effect.[15] Thus in *Hinton v. Norfolk and Western Ry. Co.*, 137 Va. 605, 120 S.E. 135 (1923), an infant brought suit by his next friend claiming damages in the amount of $125.00 for personal injuries allegedly due to the defendant's negligence. This action was dismissed by the following order:

> "On motion of the plaintiff by R. S. Parks, his counsel, and it appearing to the court that this action has been compromised between the parties on the terms that the defendant should pay the sum of $125.00 and further that the said sum has been paid to the duly qualified guardian of the plaintiff, who consented to compromise and who is also the mother of the plaintiff and his next friend in this action, it is ordered that this cause be *dismissed settled.*"[16]

In the subsequent suit by the infant on the same cause of action this order was given the effect of an order "dismissed agreed".[17] Likewise, in *Martin v. Martin*, 167 Va. 206, 188 S.E. 148 (1936), the order entered in the first suit which was held to bar the second suit was entered only after a written agree-

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15. *Compare* Martin v. Martin, 167 Va. 206, 188 S.E. 148 (1936) and Hinton v. Norfolk and Western Ry. Co., 137 Va. 605, 120 S. E. 135 (1923); *with* Murden v. Wilbert, 189 Va. 358, 53 S.E. 2d 42 (1949), Wohlford v. Compton, 79 Va. 333 (1884) and Hoover v. Mitchell, 66 Va. (25 Gratt.) 387 (1874).

16. Hinton v. Norfolk and Western Ry Co., *supra* at 607, 120 S.E. at 135 (Emphasis added).

17. It was argued by the plaintiff that the order did not approve the terms of the agreements, but since the stated settlement of the prior case was the entire amount of damages claimed it was held that approval was not necessary. *Id.* at 610, 120 S.E. at 136.

ment of the parties had been submitted to the court, and which, indeed, the court had been unwilling to accept until receiving a commissioner's report.[18]

Assuming, however, though not conceding, that the order of the Law and Equity Court of the City of Richmond was a "dismissed agreed" order, from a close reading of the Virginia decisions it is clear that such an order in a custody proceeding would not be res judicata in a Virginia court to a subsequent custody proceeding. Such an order is "evidence only 'that the cause of action has been adjusted by the parties themselves in their own way.' "[19] It does not go to the merits of the case, but is given that effect "because such an order imports that the dismissal is on the merits by stipulation of the parties."[20] Thus the real basis for giving barring effect to such an order in Virginia is the underlying contract of the parties.

This is forcefully brought out in *Bardach Iron and Steel Co. v. Tenenbaum,* 136 Va. 163, 118 S.E. 502 (1923), in which the Supreme Court of Appeals of Virginia considered the point of whether or not a trial court properly could set aside an order "dismissed agreed" once having entered it. On this point the court said:

> "The court has no power to make such a record except by consent of the parties, and, having obtained such consent and made the entry, it is equally without power to set it aside without the consent of both parties, *except upon some ground that would warrant the setting aside of other contracts of like nature.*"[21]

In other words, the question resolves itself to whether or not the court must honor the civil contracts of the parties.

There can be no doubt that a Virginia court is not so bound in a custody matter. In Virginia the rule is firmly established "that the welfare of the infant is the primary, paramount, and

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18. Martin v. Martin, *supra.*

19. Murden v. Wilbert, 189 Va. 358, 363, 53 S.E. 2d 42, 44 (1949).

20. Payne v. Buena Vista Extract Co., 124 Va. 296, 313, 90 S.E. 34, 40 (1919). This principle lends further weight to Point I of this argument.

21. Bardach Iron and Steel Co. v. Tenenbaum, *supra,* at 171, 118 S.E. at 504. (Emphasis added.)

controlling consideration of the court in all controversies between parents over the custody of their minor children. All other matters are subordinate."[22] The rights of neither parent take precedence over the rights of the child.[23] The contract of the parents cannot bind a Virginia court on the question of custody of minor children in either divorce proceedings or habeas corpus proceedings.[24] "The custody and welfare of children are not the subject of barter."[25]

These principles have been enunciated time and again by the Virginia court, and constitute basic and strong public policy of that State. To conclude, as the Supreme Court of South Carolina did, that a Virginia court would favorably entertain a plea of res judicata based on an agreement between parents, in a matter where the primary interest is the welfare of the children, is absolutely contrary to this public policy, and therefore is plainly wrong.

III

In Its Parens Patriae Jurisdiction, Properly Invoked, A State May Resolve Questions Of Custody Solely Upon The Basis Of That Which Is In The Best Interest Of The Children.

This matter was heard in the Juvenile and Domestic Relations Court of Greenville County. The jurisdiction of the court is defined in S. C. 48 Stat. 1827 (1954), see note 1, *supra*, which provides that the Juvenile and Domestic Relations Court shall have exclusive jurisdiction and shall be the sole agency for initiating action concerning any child living or found within

22. Brooks v. Brooks, 200 Va. 530, 539, 106 S.E. 2d 611, 617 (1959); Florance v. Florance, 197 Va. 432, 435, 90 S.E. 2d 111, 113 (1959); Mullen v. Mullen, 188 Va. 259, 269, 49 S.E. 2d 349, 354 (1948).

23. Mullen v. Mullen, *supra*, at 270, 49 S.E. 2d at 354.

24. Williams v. Woolfolk, 188 Va. 312, 317, 49 S.E. 2d 270, 272 (1948); Gloth v. Gloth, 154 Va. 511, 551, 153 S.E. 879, 892, 71 A.L.R. 700, 720 (1930); Buchanan v. Buchanan, 170 Va. 458, 477, 197 S.E. 426, 434, 116 A.L.R. 688, 698 (1938).

25. Buchanan v. Buchanan, *supra* at 477, 197 S.E. at 434, 116 A.L.R. at 698 (1938). Compare the controlling principles in Virginia with those discussed in Boone v. Boone, 150 F. 2d 153 (D.C. Cir. 1945).

the county whose custody is the subject of controversy. Although the proceeding is designated "*Barbara D. Ford, plaintiff v. Herman A. Ford, defendant*", no divorce or separation was sought; and as expressed by Mr. Justice Cardozo,[26] the Judge of the Juvenile and Domestic Relations Court acted as *parens patriae*. He was not adjudicating a controversy between adversary parties, to compose their private differences, and was not determining rights as between a parent and a child or as between one parent and another.[27]

In *People of the State of New York v. Halvey*, 330 U. S. 610, 616 (1947) this Court left undecided "whether the State which has jurisdiction over the child may, regardless of a custody decree rendered by another State, make such orders concerning custody as the welfare of the child from time to time requires"; and, although the issue has subsequently arisen in this Court,[28] the cases have been decided upon the grounds.

As indicated by the argument in Points I and II of this brief, it is believed that this is another case in which the consideration of the much broader issue of Point III need not necessarily be reached; but if this Court should decide otherwise, we earnestly contend that under the circumstances of this case wherein the application of the harsh rule of res judicata would serve to defeat that which has been judicially determined to be in the best interest of the children, the *parens patriae* jurisdiction of the Juvenile and Domestic Relations Court should be interposed. As discussed in Point I of this brief, states surely have equal if not greater responsibility to protect infants in their well being than to protect them in their property; and as the state has the responsibility, a fortiori it has the power insofar as it is within the confines of the Constitution. We believe that the Full Faith and Credit Clause does not preclude the free exercise of, or interposition of the *parens patriae* jurisdiction of a state for the reasons set forth in *Williams et al v. State of North Carolina*, 325 U. S. 226 (1945). Indeed, by merely substituting the

26. Finlay v. Finlay, 240 N. Y. 429, 148 N.E. 624, 626 (1925).
27. Queen v. Gyngall, 2 Q. B. Div. 232, 238 (1893).
28. May v. Anderson, 345 U. S. 528 (1953); Kovacs v. Brewer, 356 U. S. 604 (1958).

status or subject involved in the present case for that involved in the Williams case a consistent and, we submit, well warranted decision would result.[29] The children involved herein were domiciled in South Carolina when the proceeding was instituted in the Juvenile and Domestic Relations Court; and the State of South Carolina has delegated to that court the duty and power to act in *parens patriae*. The fact that the person who invoked the jurisdiction of the court happened to be the mother of the children, and the fact that the mother and the father had previously been parties to a proceeding in which the father had sought an adjudication as to custody but had subsequently consented to a dismissal upon agreement of the parties, are merely fortuitous circumstances and are of no effect. The State of South Carolina and the children themselves are the real parties in interest in the South Carolina proceeding, and there was no adjudication of their interests in the Virginia Court. The order of that court was, therefore, not res judicata.

CONCLUSION

For each and every of the foregoing reasons we submit that the South Carolina Court was not required by Article IV, Section I of the Constitution of the United States to grant full faith and credit to the order of the Law and Equity Court of the City of Richmond, Virginia, and that the order of that court

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29. Williams et al v. State of North Carolina, 325 U. S. 226, 230 (1945): "Divorce, like marriage (Custody of infants), is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Since divorce, like marriage (an award of custody), creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises.

"It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. (Citations omitted.) But those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a State, which is concerned with a vindication of its own social policy and has no means, certainly no effective means, to protect that interest against the selfish action of those outside its borders."***. (Interpolation added).

was not res judicata; therefore, the judgment of the Supreme Court of South Carolina should be reversed.

Respectfully submitted

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APPENDIX

IN THE SUPREME COURT
OF THE STATE OF SOUTH CAROLINA

BARBARA D. FORD, *Respondent*,

v.

HERMAN A. FORD, *Appellant*.

OPINION No. 17850—Filed November 15, 1961

Moss, A. J.: Barbara D. Ford, the respondent herein, and Herman A. Ford, the appellant herein, were married on March 16, 1952, in Richmond, Virginia. Three children were born of this marriage and they were at the time of the institution of this action seven, five and three years of age, respectively.

The respondent did, on August 10, 1960, commence this action in the Greenville County Juvenile and Domestic Relations Court seeking custody of the three minor children of the marriage. The complaint alleged that the children were residing with the respondent in Greenville County, South Carolina, and that it was for the best interest of the said minor children that their custody be awarded to her. It is further alleged that the appellant had been guilty of misconduct and was an unfit person to have custody of the said children. The answer of the appellant alleges that the appellant and respondent are living separate and apart on account of the misconduct of the respondent. It is further alleged that the respondent is not a fit or proper person to have the custody of the said minor children by reason of her misconduct. The answer further alleges that the appellant is entitled to the custody of the said minor children of the marriage, he being a fit and proper person to have such custody and is financially able to provide for the educa-

tion, maintenance and support of the said children in a comfortable and desirable home in Sanford, North Carolina.

The answer further alleges that the appellant and respondent separated on August 25, 1959, and the respondent went to the home of her mother in Richmond, Virginia, the children remaining in North Carolina in the custody of the appellant. It is further alleged that on August 27, 1959, that the respondent took the children of the marriage from the State of North Carolina to the home of her mother in Richmond, Virginia. It is further alleged that on August 28, 1959, the appellant did, in the Law and Equity Court of the City of Richmond, Virginia, file a petition for a Writ of Habeas Corpus directing the respondent to produce the bodies of the three children before the Court at a time and place to be specified and to do and receive what shall then and there be considered by the Court concerning said children, and that the care, custody and possession of the said children be awarded to the appellant. An Order awarding a Writ of Habeas Corpus was issued by the Law and Equity Court of Richmond, Virginia, on August 28, 1959, directing the respondent to have and produce the bodies of the said children before the Court on September 2, 1959, and to abide the direction of the Court as to the custody of said children. The respondent filed a Return to the Writ of Habeas Corpus alleging that she was a fit and proper person to have the custody of the said infant children. She asked that the Writ be discharged as having been improvidently issued without probable cause.

The answer of the appellant further alleged that during the pendency of the Habeas Corpus proceeding in the Law and Equity Court of the City of Richmond, Virginia, both (fol. 196) parties being represented by competent legal counsel, an agreement was reached concerning the children of the marriage. Under the terms of the agreement, the appellant was given custody of the three children with the right to the respondent to have custody of the three children during the summer vacation from school and certain holiday periods. Under the consummation of the aforesaid agreement reached between the parties, a "Consent Dismissal" was had of the Habeas Corpus

proceeding instituted by the appellant. The Order of Dismissal by the Law and Equity Court of the City of Richmond, Virginia, filed November 18, 1959, was as follows:

> "It being represented to the court by counsel that the parties hereto have agreed concerning the custody of the infant children, it is ordered that this case be dismissed."

The instant case was tried before the Honorable J. Wilbur Hicks, Judge of the Greenville County Juvenile and Domestic Relations Court, and on December 8, 1960, he issued his order awarding the custody of the children to the respondent, with the provision that the appellant "shall have reasonable visitation rights and these shall include some holidays and school vacation periods and are to be agreed upon by the parties." The appellant duly excepted to the order of the Judge of the Juvenile and Domestic Relations Court and alleged error, *inter alia*, (1) That the Judge erred in failing to hold that the agreement previously made between the parties, through their respective counsel, at a time when an action was pending in the Law and Equity Court of the City of Richmond, Virginia, determined the question of custody and was binding upon the parties. It was asserted that the respondent admitted the making of such agreement and acknowledged that she was represented in such proceeding by able and competent counsel. It was further alleged as error that the court failed to hold that the agreed Order of Dismissal of the Law and Equity Court of the City of Richmond, Virginia, was *res judicata* as to the issue of custody before this Court. (2) That the Judge erred in failing to hold that the said agreement between the parties and the aforesaid agreed Order of Dismissal was binding and *res judicata*. It was further submitted that the Juvenile and Domestic Relations Court of Greenville County must recognize, in accordance with the full faith and credit clause of the Constitution of the United States, the agreed Order of Dismissal of the Virginia Court and that such was *res judicata* unless there was evidence of subsequent misconduct on the part of the appellant or a change of conditions warranting a

change of the custody of the children. (3) That the Judge erred in awarding the custody of the children to the respondent and giving the appellant only visitation rights to be agreed upon by the parties.

The appeal from the order of the Judge of the Juvenile and Domestic Relations Court of Greenville County was heard by the Honorable John Grimball, presiding Judge, on January 9, 1961, at a special Equity term of the Court of Common Pleas for Greenville County, South Carolina.

By an order dated February 25, 1961, the presiding Judge overruled the provision of the order of the Juvenile and Domestic Relations Court to the extent that he awarded the custody of the three minor children jointly to the respondent and the appellant, placing the custody of the said children in the respondent during the normal school year, commencing in September and ending in the early part of June of each year. He awarded custody of the three minor children to the appellant during the normal school holiday months, commencing in the early part of June and ending in the early part of September of each year. This order provided further that the appellant should have the custody and control of the children during the normal Christmas holidays of each school year. It was further provided that during the time that either the respondent or appellant had custody, the other party should be permitted to see or visit with the children at reasonable times and places. The presiding Judge refused to hold as *res judicata* the custody agreement reached by and between the parties, as a result of which the Habeas Corpus proceeding instituted by the appellant in the Law and Equity Court of the City of Richmond, Virginia, for the purpose of obtaining a custody of the minor children of the parties, was dismissed. He likewise refused to give full faith and credit to the agreed dismissal order of the Virginia Court. Within due time the appellant gave notice of intention to appeal to this Court from the order of the lower Court. The appellant asserts (fol. 197) that the trial Judge erred in refusing to hold as *res judicata* the "Consent Dismissed" order of the Law and Equity Court of the City of Richmond, Virginia, which was made after the

parties to this action had reached an agreement concerning the custody of the infant children here involved.

It is provided in Article IV, Section 1, of the Constitution of the United States; that:

> "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

In the case of *Hamilton v. Patterson*, 236 S. C. 487, 115 S. E. (2d) 68, this Court said:

> "• • • Where a judgment rendered by a court having jurisdiction of the cause and the parties is challenged in another State, 'the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based.' *Milliken v. Meyer*, 311 U. S. 457, 61 S. Ct. 339, 342, 85 L. Ed. 278. 'Because there is a full faith and credit clause a defendant may not a second time challenge the validity of the plaintiff's right which has ripened into a judgment.' *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 64 S. Ct. 208, 214, 88 L. Ed. 149, 150 A. L. R. 413.
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> "This clause of the Federal Constitution U. S. Const. art. 4, section 1 and the Act of Congress which implements it 'require the judgments of the courts of one State to be given the same faith and credit in another State as they have by law or usage in the courts of the State rendering them.' *Morris v. Jones*, 329 U. S. 545, 67 S. Ct. 451, 454, 91 L. Ed. 488, 168 A. L. R. 656."

In order to make out the defense of *res judicata*, the following elements must be shown: (1) The parties must be the same or their privies; (2) The subject matter must be the same; and (3) While generally the precise point must be ruled, yet where the parties are the same or are in privity, the judgment is an absolute bar not only of what was decided but what might have

been decided. *Mackey v. Frazier*, 234 S. C. 81, 106 S. E. (2d) 895.

What was the effect of the agreed order under the Virginia Law and which came about as a result of a custody agreement reached between the parties with the advice and consent of their counsel? Does an agreed order of dismissal under the Virginia practice put an end to a pending suit and bars any subsequent suit on the same cause of action between the same parties? In the case of *Bardach Iron & Steel Co., Inc. v. Tenenbaum*, 136 Va. 163, 118 S. E. 502, the effect of an order "dismissed agreed" is fully discussed. The order there involved was "on motion of the plaintiff and with the consent of the defendant, this cause is dismissed agreed." The Virginia Court in discussing the effect of such order, said:

> "Ordinarily, the records of a court of record remain in the breast of the court, and subject to change or alteration by the court during the term at which they are made, but an order 'dismissed agreed' is an exception to the general rule. The court has no power to make such a record except by consent of the parties, and, having obtained such consent and made the entry, it is equally without power to set it aside without the consent of both parties, except upon some ground that would warrant the setting aside of other contracts of like nature. It is a contract of record that the court is without power to disturb except as stated. The court may correct its own errors, but cannot change the contracts of parties without their consent. *Deaver v. Jones*, 114 N. C. 649, 19 S. E. 637; *Hammond v. Place*, Har. (Mich.) 438. If the trial court was without power to set aside the order 'dismissed agreed' made on December 8, 1921, that was an end of the case. Such an order not only puts an end to the pending suit, but is a bar to any subsequent suit on the same cause of action, between the same parties, as fully as a retraxit would be.
>
> (fol. 198) " 'It is a declaration of record sanctioned by the judgment of the court, that the cause of action has been adjusted by the parties themselves, in their own way.' *Hoover v. Mitchell*, 25 Grat. (66 Va.) 387, 388; *Wohlford v. Compton*, 79 Va. 333; *Siron v. Ruleman*,

32 Grat. (73 Va.) 215, 223; *Jarboe v. Smith*, 10 B. Mon. (Ky.) 257, 52 Am. Dec. 541; *U. S. v. Parker*, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. Ed. 601; *Simmons v. Yoho* (W. Va.), 115 S. E. 851, 857; 1 Freeman on Judgments, sec. 262; 2 Black on Judgments, sec. 706.

"In *Jarboe v. Smith*, 10 B. Mon. (Ky.) 257, 52 Am. Dec. 541, it is said to be a bar between the parties on the original cause of action, unless there is an express stipulation that another suit may be brought. In the judgment entered in *Hoover v. Mitchell*, supra, it is said that the dismissal of a suit agreed, without any explanation or qualification showing a contrary intention, is at least a prima facie determination of the matter controverted in that suit, but the opinion in the case holds that 'dismissed agreed' is equivalent to a retraxit. But to have this effect there must have first been an unqualified agreement that the suit should be 'dismissed agreed.'"

In the case of *Murden v. Wilbert*, et al., 189 Va. 358, 53 S. E. (2d) 42, it was held that the judgment of a court of competent jurisdiction dismissing a suit agreed, upon the ground that it had been agreed by the parties, is a final determination, as to those parties, of the matters litigated in that suit. It was further held that an order "dismissed agreed" is a contract of record that the court is without power to disturb except with consent of the parties.

In the case of *Hinton v. Norfolk & W. Ry. Co.*, 137 Va. 605, 120 S. E. 135, it appears that there was a mutual agreement to settle an action brought by an infant, by his next friend, by payment of the demand in full and was reported to the court and a motion was made by plaintiff to dismiss such action. The order stated that the action was "dismissed settled". The Court said:

"• • • Every distinguishing feature of a case 'dismissed agreed' appears, for there is the mutual agreement to terminate the case, which is reported to the court, and the consequent motion by the plaintiff to dismiss it. The consequences of such a dismissal are well understood and constitute a bar to a subsequent action between the same parties for the same cause.

"It is sufficient to cite the recent case of *Bardach I. & S. Co., Inc. v. Tenenbaum*, 136 Va. 163, 118 S. E. 502."

In the case of *Virginia Concrete Co. v. Board of Supervisors*, 197 Va. 821, 91 S. E. (2d) 415, the Virginia Court said:

"A retraxit is a voluntary renunciation by the plaintiff in open court of his suit and the cause thereof, and by it he forever loses his actions. 6 Mich. Jur., Dismissal, etc., sec. 35, p. 244; Burks Pl. & Pr., 4 ed., sec. 337, p. 646.

"An order 'dismissed agreed' not only puts an end to the pending suit, but is a bar to any subsequent suit on the same cause of action by the same parties 'as fully as a retraxit would be.' *Bardach Iron & Steel Co. v. Tenenbaum*, 136 Va. 163, 171, 118 S. E. 502, 505."

In this same Virginia Concrete Co. case it was further held that a dismissal order, even in general terms, which does not contain any reservation of right of either party to sue thereafter, is *res judicata* with respect to all matters covered by the pleadings of the case. The Court said:

"In *Wilcher v. Robertson*, 78 Va. 602, 618, it is likewise said that 'An order simply dismissing the suit is not a determination on the merits, and so is not a bar to the maintenance of a second suit for the same cause of action.' But in the earlier case of *Taylor v. Yarbrough*, 13 Grat. 183, 194, 54 Va. 183, 194, it was held that a decree which dismissed a bill in general terms and without any specification of grounds therefor, or reservation of a right to sue thereafter, must be taken to rest upon all the issues presented by the (fol. 199) pleadings and regarded as a final judgment of the entire right asserted. Much depends on the stage of the proceedings at which the order was entered and the reason for its entry. It is well, therefore, to heed the admonition in Lile's Equity Pl. & Pr., 3d ed., sec. 273, p. 157, that where the plaintiff voluntarily dismisses his suit or when it is dismissed involuntarily for reasons not affecting the merits of the case, the order should recite that the dismissal is 'without prejudice to plaintiff's right to institute such

further suits concerning the same matter as he may be advised,' in order to avoid a plea of *res judicata* in future litigation. See also *Newberry v. Ruffin*, 102 Va. 73, 76, 45 S. E. 733."

The North Carolina case of *Steele v. Beaty*, et al., 215 N. C. 680, 2 S. E. (2d) 854, was an action to recover damages for personal injuries alleged to have been caused by an assault by the defendants. The defendants pleaded settlement and a judgment in a former action based on the same cause of action. It appears that when the settlement was made that the order provided "Upon motion and by consent it is agreed that said action be, and the same is hereby dismissed." A judgment was rendered for the plaintiff and an appeal was prosecuted by the defendants. In reversing the judgment of the lower Court, the Supreme Court of North Carolina held that a "judgment of dismissal" entered by agreement of the parties pursuant to a compromise and settlement of the controversy is a judgment on the merits barring any other action for the same cause. It was further held that a "judgment in retraxit" is usually based upon and follows a settlement out of court, and like a judgment on the merits is a bar and estops plaintiff from again proceeding in another suit on the same cause of action. It was also held that the legal effect of an order dismissing a suit agreed is to bar any other suit between the same parties on the original cause of action, thus adjusted by them and merged in the judgment of the court, rendered at their instance, and in consequence of the agreement. We quote the following from this case:

"To hold that a judgment of dismissal by consent is not a bar would deny any effect whatever to the agreement of the parties and would treat the judgment of dismissal merely as a voluntary act of the plaintiff. *Doan v. Bush*, 130 Ark. 566, 198 S. W. 261, L. R. A. 1918B, 523. The legal deduction to be drawn from a judgment dismissing a suit by agreement of the parties is that the parties had by their agreement adjusted the subject matter of the controversy in that suit; and the legal effect of such a judgment is, therefore, that it will operate as a bar to any other

suit between the same parties on the identical cause of action then adjusted by them and merged in the judgment therein rendered at their instance and in consequence of their agreement."

In the case of *Yancey v. Yancey,* 230 N. C. 719, 55 S. E. (2d) 468, the husband brought an action against his wife to establish a resulting trust in realty. A previous action for the same cause had been dismissed and judgment entered "that the matters and things in controversy have been settled between the parties," and that, therefore, it was "adjudged and decreed that the plaintiff be nonsuited." The lower Court held that the previous judgment for the same cause, nonsuiting the plaintiff and reciting that the matters involved had been settled between the parties, was a bar to this action, citing the case of *Steele v. Beaty,* et al., supra. The Supreme Court of North Carolina affirmed the judgment of the lower Court. In the opinion, it is stated that the plaintiff admits the previous order above quoted. It is further stated that the plaintiff did not allege fraud, nor did he attack the judgment nor seek to vacate it. The Court said:

"• • • Hence standing upon the docket it is a judgment of retraxit, and it bars a new action. Before he can prosecute another action for the same cause he must in some proper way remove this judgment from his pathway. *Moody v. Wike,* 170 N. C. 541, 87 S. E. 350; *Fowler v. Fowler,* 190 N. C. 536, 130 S. E. 315; McIntosh Prac. & Pro. 745."

In the West Virginia case of *In Re McIntosh's Estate,* 109 S. E. (2d) 153, the Supreme Court of Appeals of the State, said:

(fol. 200) " • • • A judgment recording a compromise settlement and dismissing the action 'settled and agreed' is sufficient on which to found a res judicata plea. *Central Trust Co. v. Harless,* 108 W. Va. 618, 152 S. E. 209; *Murden v. Wilbert,* 189 Va. 358, 53 S. E. (2d) 42; 50 C. J. S. Judgments, sec. 634."

A review of the cases decided in Virginia convinces us that the Order of Dismissal by the Law and Equity Court of the City of Richmond, Virginia, was a "dismissed agreed" one

because it appears upon the face of the order that there was a settlement between the parties concerning the custody of the infant children and there was a mutual agreement to terminate the case. Such a judgment of dismissal entered by agreement of the parties, pursuant to a compromise or settlement of the controversy, is a judgment on the merits, barring another action for the same cause and is equivalent to a judgment of retraxit. If the respondent here had instituted in the Courts of Virginia the action commenced by her in the Courts of this State, the appellant could have successfully interposed a plea of *res judicata* as a defense to said action. Since the judgment entered in the Virginia Court by agreement or consent is *res judicata* in that State, it is *res judicata* and entitled to full faith and credit in this State. We are required under Art. IV, Sec. 1 of the Constitution of the United States to give the same faith and credit in this State to the "dismissed agreed" order or judgment as "by law or usage" the Courts of Virginia would give to such order or judgment.

It is undisputed that the parties in the Virginia proceeding are the same as the parties here. The issue before the Court in Virginia and in the Court here was which of the parties should have the custody of the three minor children. There is, therefore, an identity of parties and subject matter.

We should point out that we have held in a number of cases that changed circumstances may authorize the change of custody of minor children. We have held that the Court may at any time on the application of any interested party, or even on its own motion, upon sufficient showing, make further disposition of the custody of a child, if new facts and circumstances make it necessary or desirable for the child's welfare. A judicial award of the custody of a child is never final. *Ex Parte Atkinson,* 238 S. C. 521, 121 S. E. (2d) 4. Applying this rule to the instant case and after examining the pleadings and the entire record we find neither allegation nor proof of any changed circumstances authorizing a change of the custody of the minor children of the parties to this action.

Since we have reached the conclusion that the "dismissed agreed" order of the Law and Equity Court of the City of

Richmond, Virginia, is a bar to this action between the same parties for the same cause, in the absence of any allegation or proof of any changed circumstances requiring a change of the custody of the children here involved, the agreement reached by the parties prior to the order of the Virginia Court is still of full force and effect.

The exceptions of the appellant raise other issues which we find unnecessary to decide in view of the conclusion heretofore reached.

It is likewise unnecessary for us to consider the exception of the respondent to the order of the Honorable J. Robert Martin, Jr., granting the motion of the appellant to stay the execution of the order of the Juvenile and Domestic Relations Court of Greenville County.

Reversed.

Taylor, C. J., Legge and Lewis, JJ., concur. Oxner, J., dissents.

Oxner, J. (Dissenting): The Court holds that the consent order of the Virginia Court dismissing the habeas corpus proceedings instituted there after appellant and respondent had reached an agreement as to the custody of their children is a judgment which, under the Full Faith and Credit Clause of the Federal Constitution, precludes the courts of this State, in the absence of any change in (fol. 201) conditions, from inquiring into and determining what is for the welfare and best interests of these children. At the time this agreement was made the marital domicile of the parties was in North Carolina. Appellant continues to be a resident of that State. Under the view taken by the majority of the Court, not only would this order constitute, in the absence of a change in conditions, an adjudication binding on the courts of this State but also on those of North Carolina. I do not agree that it has such effect.

It is generally held that the judgment of a Court of one State as to custody of children must, in the absence of fraud or want of jurisdiction, be given full effect in every other State as to the facts before the Court at the time such judgment was rendered. *Hartley v. Blease*, 99 S. C. 92, 82 S. E. 991; An-

notation 116 A. L. R. 1299. The underlying reason for this was stated by Mr. Justice Frankfurter in a concurring opinion in *People of State of New York v. Halvey*, 330 U. S. 610, 67 S. Ct. 903, as follows: "The constitutional policy formulated by the Full Faith and Credit Clause cannot be fitted into tight little categories or too abstract generalities. That policy was the nationwide restriction of litigiousness, to the extent that States, autonomous for certain purposes, should not be exploited to permit repetitive litigation. In substance, the Farmers deemed it against the national welfare for a controversy that was truly litigated in one State to be relitigated in another. Such limitation does not foreclose inquiry into what was litigated and what was adjudicated."

In this proceeding respondent is not seeking to relitigate an issue which has been litigated in Virginia. The merits of the present controversy were never considered nor passed upon in that State. In fact, the agreement made between the parties was never exhibited to the Court. It follows that the order entered by the Virginia Court was not pronounced in the exercise of its judicial function. Such order, referred to in the Virginia decisions as an order "dismissed agreed", is apparently there regarded as binding on the parties because the courts "cannot change the contract of the parties without their consent." *Bardach Iron and Steel Co., Inc. v. Tenenbaum*, 136 Va. 163, 118 S. E. 502. This is in accord with the general rule that a judgment or decree, though entered by consent of the parties, is res judicata to the same extent as if entered after contest. *Norton v. Planters Fertilizer & Phosphate Co.*, 206 S. C. 119, 33 S. E. (2d) 247; Annotation 2 A. L. R. (2d) 514. I do not question the soundness of this principle when applied to an ordinary civil action. If this were purely a personal contest between the parties over a legal right, there would exist a basis for holding that the Virginia order is binding. But I do not think it is binding in another State in a proceeding relating to the custody of children. Such a proceeding is not to be judged, nor the results measured, altogether by technical rules that have to do with property rights. Like marriage, the custody of young children is of importance to the State. It is not

a property right of the parents. It is stated in 17A Am. Jur., page 31: "If the original award was made casually, pursuant to an agreement of the parties, and without a true judicial consideration of the facts, it is proper to consider the facts as they existed at the time the decree was entered in determining whether the order should be modified."

The reasons advanced in the Virginia decisions for the binding effect of an order "dismissed agreed" have no applicatio here. While these parties were at liberty to contract with each other with respect to the custody of their children, such a contract is not binding on the courts. It is always open to judicial inquiry as to whether such agreement is for the best interests of the children. "Parents have no 'property rights', in the ordinary sense of that term, in and to their minor children, and accordingly a parent's right of control or custody of a minor child is not a property right which may be bargained, sold, or otherwise disposed of." 67 C. J. S., page 636. As stated by Mr. Justice Jackson in his dissenting opinion in *May v. Anderson*, 345 U. S. 528, 73 S. Ct. 840: "Custody is viewed not with the idea of adjudicating rights *in* the children, as if they were chattels, but rather with the idea of making the best disposition possible for the welfare of the children."

In a case of this kind the rights of the parents are subordinate to the welfare of the children. *Graydon v. Graydon*, 150 S. C. 117; 147 S. E. 749. While their rights will be duly regarded, the paramount consideration is the best interests of the children. *Koon v. Koon*, 203 S. C. 556, 28 (fol. 202) S. E. (2d) 89; *West v. West*, 208 S. C. 1, 36 S. E. (2d) 856; *Dillon v. Dillon*, 219 S. C. 255, 64 S. E. (2d) 649. This paramount consideration is for determination by the courts and not by the parents. The contract between these parties entered into in Virginia does not under my view preclude the courts of this State from determining the question of custody or as to how custody should be divided between these parties. The children are lawfully in this State and, in my opinion, the question as to whether the agreement made by the parents is for their best welfare is open for judicial determination.